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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Claims (R. 26–36) are reported in 95 C. Cls. 84.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 36). The petition for a writ of certiorari was filed on February 27, 1942 (R. 36), and granted April 13, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the United States impliedly warrants that no stoppage or delay will occur which will prevent performance of the contractor's work within the time for completion specified in a standard form government construction contract.

2. Whether Article 4 or any other provision of a standard form government construction contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions.

3. Whether Article 4 of a standard form government contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of his contract.

4. Whether failure to appeal to the head of the department from a contracting officer's rejection of a claim under Article 4 bars a recovery under Articles 3, 4 and 15 of a standard form government construction contract.

STATEMENT

This is a suit to recover from the United States damages due to delays in the performance of a government contract for which the United States is alleged to be responsible. The facts, as found

by the Court of Claims (R. 17–26), are as follows:

On April 29, 1932, the D. C. Engineering Company, Inc., of which respondents are the receivers,[1] entered into a standard form construction contract with the United States, acting through the Director of Construction of the Veterans' Administration, to supply and install the plumbing, heating equipment, and electrical work in the Veterans' Administration Home, to be constructed at Togus, Maine (R. 20). The Government's invitation to bid, dated March 12, 1932, indicated that the home was to be constructed under four separate contracts: (a) general construction, (b) plumbing, heating, and electrical work, (c) electric elevators, and (d) refrigerating plant; that the general contractor would prepare the site and construct the building; and that the mechanical equipment called for by the other contracts was to be installed, in accordance with the plans and specifications, as the building progressed (R. 17–19). The specifications for the entire project were included in one volume (R. 17). Each standard form contract to be entered into between the Government and the successful bidder for the classification of work covered by his bid was to contain the detailed specifications applicable thereto (R. 17). The plans and draw-

[1] The Engineering Company is sometimes referred to hereinafter as "respondent."

ings for the entire work to be performed under all the contracts with the Government either accompanied the specifications or were made available to all bidders (R. 17). Bidders for the plumbing, heating, and electrical contract were notified that their work was to be completed at a date not later than that provided for the completion of the general construction contract and were referred to the provisions of that contract (R. 19). No separate completion date for the plumbing and electrical contract was fixed (R. 7). Before submission of its bid, respondent company conferred with the Government's contracting officer to determine when the work of construction would commence; it was advised by him that construction would commence in the early spring of 1932, as soon as weather conditions would permit, so that the building would be under roof and enclosed before the cold weather (R. 20–21).

The respondent's contract contained the standard provisions permitting the Government to issue change orders within the general scope of the contract and specifications (Art. 3; R. 8, 21); covering changes due to the discovery of subsurface and/or latent conditions materially differing from those shown on the drawings, or indicated in the specifications (Art. 4; R. 8, 21); excusing the contractor from liability for liquidated damages for delays due to unforeseeable causes beyond the contractor's control and without his negligence

(Art. 9; R. 10); and requiring the contractor to cooperate fully with the other contractors on the job, to fit his own work to that provided under the other contracts, and not to interfere in any way with their performance (Art. 13; R. 12, 19). The contract also provided that the work was to be commenced promptly after receipt of a notice to proceed and was to be completed not later than the date provided in the general construction contract (Art. 1; R. 7, 20).

The Government's contract with the general construction contractor, signed April 21, 1932, provided that the work was to be completed within 250 calendar days after the date of receipt of the notice to proceed (R. 19). Notice to proceed was given by the Government to the general construction contractor on May 9, 1932, and to the respondent on May 12, 1932 (R. 20). Accordingly, the work was originally scheduled for completion on January 14, 1933 (R. 20). Excavation work was commenced immediately after May 9, 1932, by the general construction contractor, and some time before June 6, 1932, it was discovered that instead of the solid foundation bearings indicated by the specifications, the site was underlain by soft soil, water and quicksand. This condition had not been anticipated by anyone (R. 23) and there is no finding that the Government had been negligent in failing to discover the nature of the subsurface soil in advance of construction. On June 6, 1932, the contracting officer ordered all con-

struction work stopped pending decision as to what was to be done. After a number of soil tests had been made, it was decided to relocate the building, and new plans and drawings were prepared. Change orders under Articles 4 and 3 of the general construction contractor's contract were issued, and an equitable adjustment, increasing the amount due to the general construction contractor by $103,489.49, was made; this amount included the sum of $68,360.57 for costs due to "extra work and delay" necessitated by the changed conditions encountered (R. 22–24).

The D. C. Engineering Company had been notified by the general contractor that sufficient progress on the foundations would be made to enable it to commence its work on June 6, 1932. Accordingly, the company employed its superintendent, and prior to June 4, 1932, shipped its tools, equipment, and material to the site. On June 6, 1932, the company's president and superintendent arrived to begin operations, but on that day all work was stopped because of the subsurface conditions encountered (R. 22–23). During the period of suspension of work from June 6 to August 8, the company protested that it should not be required to proceed with its work in the wintertime unless an adjustment in the amount due it were made under Articles 4 and 3 of the contract to compensate for increased costs due to the delay and the necessity of performing the work in winter weather. Except for changes, not

involved in this litigation, caused by the relocation of the building which slightly reduced respondent's contract price (R. 26), there was no suggestion that the specifications for the work to be performed by the company were changed. The contracting officer refused to make such an adjustment. There is no showing that the company appealed this rejection of its claim to the head of the department under Articles 4, 3 and 15 of the contract (R. 24).

Excavation on the new site was commenced by the general construction contractor on August 9, 1932, and the work had progressed far enough by October 8, 1932, to permit the D. C. Engineering Company to commence its work on that date. It was required to complete the work in the very cold winter months from October 1932 to April 1933. The efficiency of its employees was much reduced and additional labor costs of $5,192.49 were incurred. The salary of the superintendent during the period of delay, from June 6, 1932, to October 8, 1932, was $1,170. The company's overhead during this 126-day period amounted to $2,987.46 (R. 23–25).

Respondent brought suit to recover these sums, among others (R. 1–6, 16). The Court of Claims entered judgment for them for the total amount of these damages, $9,349.95 (R. 26), Judge Madden dissenting (R. 34). Other claims of respondents for damages for other delays were denied (R. 25–26) and are not here involved.

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The opinion of the court, delivered by Judge Littleton, and apparently concurred in only by Judge Green, appears to rest on the grounds that the Government is liable for all delays in the absence of an affirmative provision excusing it from responsibility (R. 27–29) and that Article 4 required the contractor to make an equitable adjustment for respondent's damages (R. 29–30). The opinion of Judge Green concurs in Judge Littleton's views, but also holds that the Government impliedly warranted the adequacy of the time specified for completion of respondent's work and that the issuance of a stop order extending the time required therefor changed the contract and rendered the Government liable for damages caused by the delay (R. 32–34). It was apparently on the latter ground that Chief Justice Whaley and Judge Jones concurred (R. 34). The latter expressly rejected Article 4 as a basis of their concurrence (R. 34). Judge Madden dissented (R. 34).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:[2]

(1) In holding that the respondent had a right to rely on representations contained in specifica-

[2] Three opinions were delivered by the judges who constituted the majority of the court below. It is not clear to what extent the grounds assigned by any one member of the court were joined in by the majority which concurred in the result. To avoid any question as to the adequacy of the assignments of error, however, the rulings of each of the majority are attributed to the court.

tions and drawings not relating to work to be performed under its contract.

(2) In holding that the respondent had a right to rely on the statements of the contracting officer relating to the period during which the general construction work would be performed.

(3) In holding that the Government warranted the adequacy of the time fixed for completion by the respondent.

(4) In holding that the Government was liable for delays in the work of respondent caused by interruption of the work of another contractor.

(5) In holding that the issuance of a stop order rendered the Government liable for the respondent's delay.

(6) In holding that the Government was liable for delay resulting from any cause for which the contractor was not responsible.

(7) In holding that the Government was liable for excess cost or damage resulting from delay unless the contract contained a provision, express or implied, relieving the Government of this responsibility.

(8) In failing to hold that the Government did not warrant to respondent the adequacy or accuracy of the subsurface conditions.

(9) In failing to hold that respondent may not recover under Article 4 for inaccuracy in specifications unrelated to respondent's work.

(10) In failing to hold that no recovery for delay may be had under Articles 3 or 4.

(11) In failing to hold that respondent cannot recover for failure to appeal the contracting officer's decision to the head of the department under Article 13.

(12) In giving judgment for respondent.

SUMMARY OF ARGUMENT

I

The contract bound the respondent-company to complete its work within a specified period, but nowhere contained any equivalent limitation upon the Government. In such circumstances it is settled that one who engages a contractor to construct a work within a given time does not warrant the adequacy of the time specified. On like principle, where several contractors are employed and the work of one is dependent on the progress of the work of another, the former receives no warranty that the latter will suffer no interruption from any cause. On the contrary, the risk of such interruption is a recognized contingency which the parties must be assumed to have considered in fixing the time for completion. *Crook Co.* v. *United States*, 270 U. S. 4.

II

1. Article 4 of the contract provides that in case of the discovery of unexpected subsurface conditions, adjustments shall be allowed for increases in cost or differences in time resulting from changes in specifications. This adjustment is in-

tended to be available only to the contractor whose specifications are changed. The warranty implied in the absence of Article 4 would have gone no further, and the article was not designed to expand the Government's liability but to prevent abandonment of the work by the contractor.

2. Numerous decisions have held that under Article 3, the reservation to the Government of the right to make changes indicates that the Government is not liable for damages from delay resulting from those changes. The same construction should be given to the similar language of Article 4.

3. Respondent cannot recover for the further reason that it did not appeal the adverse decision of the contracting officer to the head of the department, as required under the contract.

III

The issuance of the stop order of itself did not render the Government liable for delay. The stoppage of the work was authorized by the contract, and the agreement contains no provision authorizing compensation for delays caused by the exercise of such authority. Moreover, the stop order did not cause the delay but merely recognized the necessity of delay resulting from the discovery of unanticipated subsurface conditions. Since the Government is not liable to respondent for the delays caused by the unforeseen subsurface conditions, it cannot be held accountable for

issuing a stop order required by the discovery of such conditions.

ARGUMENT

I

THE GOVERNMENT GAVE RESPONDENT NO WARRANTY THAT THE GENERAL CONTRACTOR WOULD SUFFER NO DELAY FROM ANY CAUSE IN CONSTRUCTING THE FOUNDATION

The contract in the instant case contained the following provision fixing the completion date (R. 7):

> The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction.

The provisions in the contract for general construction thereby incorporated in the contract of respondent provided that (R. 19):

> The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed.

Article 9 of the contract with respondent (R. 10–11) dealt specifically with the subject of delay *by the contractor*. It provided that in case of such delay the Government may either terminate the contract or receive liquidated damages for each calendar day of delayed performance, and then

contained the significant proviso that the contractor shall not be

> charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes * * *.

1. There can be no question that if a single contract had been let in these terms for the construction of the entire project, the Government would not have been held to have warranted the adequacy of the time specified for completion, or that no difficulties causing delay would be encountered. All of these contract provisions together disclose that the obligation of timely completion was imposed solely on the contractor. No parallel or equivalent obligations were laid upon the Government. Indeed, the work was to be commenced only when the Government gave the word (R. 7), and the Government reserved the right to make changes which would inevitably change the time for completion (R. 8). It is apparent from the contract and offer together that time was considered essential only as to the contractor's agreement to build and not as to any promise by the

Government. Cf. *Werner* v. *Zintsmaster*, 61 F. (2d) 298 (C. C. A. 3).

There was thus neither an express promise nor any basis for implying a warranty by the Government as to the time within which performance could be completed. Indeed, it is settled that in the absence of an express agreement, the contractor is liable for breach of contract as a result of delay caused by unanticipated difficulties. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938) § 1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor, and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States*, 245 U. S. 159; *Navarro Corp.* v. *School District*, 25 Atl. (2d) 808 (Pa. 1942). Judge Littleton's opinion assumes that in the absence of a specific provision relieving the Government of liability, the Government is responsible for damages from delay, even though not attributable to the Government's fault. But the law is to the contrary; unless liability is imposed by an express provision of the contract, the Government is not liable.

Furthermore, the contract provided in Article 9 that, despite its strict clauses as to liquidated damages for delay by the contractor, he would not be liable for delay due to unforeseeable causes

beyond his control. The theory of the court in this case would subject the Government to damages for delay from unforeseeable causes. If the contractor who was obliged to complete the work within a specified time was not to be held liable for such delay, it surely is unreasonable to impose a more stringent liability upon the Government, which had made no commitments at all on the subject. The only plausible reason for the absence of a similar clause protecting the Government is that no such clause was thought to be necessary for the Government's protection. As this Court said in *Crook Co.* v. *United States,* 270 U. S. 4, 6:

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable

> from the point of view of both parties to the contract in the suit. * * * We are of the opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out * * *.

2. An additional obstacle to the implication of a warranty by the Government of no delays exists where the work is divided among several contractors and the performance of the claimant is made dependent on that of other contractors. In this case, the work of the general construction contractor was to be completed within 250 days from the date of receipt of notice to proceed (R. 19), and respondent was to finish at a date not later than that fixed in the general construction contract (R. 20) and to fit its work to that of the other contractors (R. 12, 20). The Government, however, did not guarantee to the general contractor that he would be able to finish on that date, much less that his excavating or other work could proceed at a given rate without interruption. And there is no reason to believe that the Government intended to give the respondent an undertaking as to the progress of the general contractor's work which it did not give to such contractor directly. Furthermore, the Government had the right to require changes in the general contractor's plans which would have resulted in delaying the completion of his work, or, by agree-

ment with him, to have extended his time to perform. In either of such circumstances, respondent's time to perform would correspondingly have been extended and respondent would have had no cause for complaint. This is a strong indication that the Government was not guaranteeing respondent that the general contractor would complete his work at the time originally specified.

The decision of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, would seem conclusive on this issue also.[3] In that case, the plaintiff contracted to install heating systems in two structures which were being constructed by other contractors. The plaintiff was required to complete on a fixed date and was given the approximate dates of completion of the two structures. The other contractors were delayed for almost a year, and plaintiff sued the Government for resulting dam-

[3] Prior to the decision in the *Crook* case, the Court of Claims had held the Government liable for the contractor's delay. *Cotton* v. *United States*, 38 C. Cls. 536; *Miller* v. *United States*, 49 C. Cls. 276; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls. 392. These cases, cited with approval by Judge Littleton (R. 28, 29), can no longer be regarded as authoritative. It is of interest to observe that the opinion of the Court of Claims in the *Crook* case (*H. E. Crook Co., Inc.* v. *United States*, 59 C. Cls. 593) which assumes that the delay constituted a breach of contract for which recovery could have been had in the absence of a waiver (59 C. Cls. at 597), is cited with approval by Judge Littleton in the instant case (R. 28). Judge Littleton apparently failed to note that the remarks upon which he relied were inconsistent with this Court's opinion in the same case.

ages incurred by reason of the delay. With respect to the contingent character of the completion date, the Court observed (*Id.* pp. 5–6):

> The contract was that the plaintiff should furnish and install heating systems "one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia. It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. "The approximate contract date of completion for the foundry" is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in

> the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.'

See also *C. A. Hooper Co.* v. *United States*, 40 F. Supp. 491 (W. D. Wis.). The portion of the opinion quoted above also refers to the Government's reservation of the right to make changes and to interrupt the continuity of the work as showing that the completion date was only provisional. Similar provisions were contained in the contract involved here (R. 8).[5]

3. The opinion of Judge Littleton relies to some extent upon the fact that the Government's con-

[4] The opinion in the *Crook* case also refers to a clause in the contract which provides that the contract price shall cover all expenses of whatever nature or description connected with the work to be done under the contract. A comparable provision does not appear in the contract involved here. However, there is nothing in the *Crook* case opinion to indicate that the conclusions quoted above are dependent upon that clause. Furthermore, it is clear from the express terms of the clause itself that it had application only to expenses incurred in work performed "under" the contract. See Record in *H. E. Crook Co. Inc.* v. *United States*, No. 122, October Term, 1925, p. 23. Therefore, that clause could have no effect on the recovery of damages for breach of contract or on the existence of a breach.

[5] The decisions of the state courts are divided on the question of an owner's liability to a contractor for delays caused by another contractor. Those holding for such liability proceed upon the theory of an implied obligation upon the part of the owner to maintain the construction work in such a state of forwardness as to enable the contractor to complete its contract within the time fixed. *Stehlin-Miller-Henes Co.* v. *City of Bridgeport*, 97 Conn. 657, 117 Atl. 811; *W. H. Stubbings Co.* v. *World's Col. Ex. Co.*, 110 Ill. App.

tracting officer made "representations" as to the period of the year during which the general construction work would be performed (R. 27, 28, 29). The court's finding of fact on this point is that the contracting officer advised respondent that the construction work would commence in the early spring of 1932, so that the building would be enclosed before cold weather set in (R. 20–22). These statements, however, cannot be regarded as warranties of the uninterrupted continuity of the work. As Judge Madden indicated in his dissenting opinion:

> The statement of the contracting officer * * * appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardly a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events. (R. 35.)

210; *Byrne* v. *Bellingham Consol. School Dist. No. 301*, 7 Wash. (2d) 20, 108 P. (2d) 791. Those denying liability hold that the owner does not guarantee against delays but merely undertakes to go forward with the work and that the risk of delays from other contractors is one of the contingencies assumed by the contractor. *Goss* v. *Northern Pac. Hospital Ass'n of Tacoma*, 50 Wash. 236, 96 Pac. 1078; *Henry Shenk Co.* v. *Erie County*, 319 Pa. 100, 178 Atl. 662; *Corporation of President, Etc.* v. *Hartford Acc. Etc. Co.*, 98 Utah 297, 95 P. (2d) 736; cf. *Edward E. Gillen Co* .. *John H. Parker Co.*, 170 Wis. 264, 171 N. W. 61. The results of the decisions have sometimes been held to turn upon particular contract provisions. Cf. *Goss* v. *Northern Pac. Hospitol Ass'n of Tacoma*, *supra*, with *Byrne* v. *Bellingham Consol. School Dist. No. 301*, *supra*.

Even if the contracting officer intended his representation to be more than a statement of his reasonable expectation, it can have no operative effect in defining the Government's obligation. Provisions as to time of performance and the conditions of performance are set forth in the written contract. They clearly purport to embody the complete understanding of the parties with respect to these matters and contain no undertaking that the work would be done at any period of the year. Reliance on the oral statements of the Government contracting officer would therefore seem precluded by the parol evidence rule. *Simpson* v. *United States*, 172 U. S. 372; 3 Williston, *Contracts* (rev. ed. 1938) §§ 639, 640. There is special reason for excluding such oral representations from consideration in the case of Government contracts, since the public policy embodied in the competitive bidding statutes would be defeated unless all bidders were required to rely solely on the uniform written invitation to bid. Cf. *Mueller* v. *United States*, 19 C. Cls. 581.

Moreover, the contracting officer represented at most the date on which the general work would begin, and the work was, in fact, commenced at the time represented, within two weeks of the day the contract was signed (R. 20, 22). It is not suggested that he expressly warranted against interruption from unforeseen causes and, for rea-

sons set forth above, no such representation may be implied.

II

THE GOVERNMENT IS NOT LIABLE TO RESPONDENT UNDER ARTICLE 4 OF THE CONTRACT FOR DELAY CAUSED BY UNFORESEEN SUBSURFACE CONDITIONS

Although respondent had made no such contention in its petition or brief in the Court of Claims, two of the five judges of that court were of the opinion that respondent was entitled to recover under Article 4 of the contract. (R. 30, 32–33.) The other two judges comprising the majority, and Judge Madden dissenting, were of a contrary view. (R. 34–35.)

Article 4 (R. 8) was included within the contract in order to give specific expression to the intention of the parties as to what should be done in the event of discovery of unanticipated subsurface conditions. Such an express provision makes unnecessary resort to the warranties which might have been implied if the contract had been silent on the subject, and becomes the exclusive manifestation of the parties' understanding. The article provides[6] that, should "the contractor" or the

[6] Article 4 reads as follows: "Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if

Government discover subsurface conditions materially differing from those "shown on the drawings or indicated in the specifications," the contracting officer shall—

> make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 3 (R. 8), thus referred to, permits the contracting officer to require changes in specifications, and contains a similar provision as to an equitable adjustment for increases or decreases in the amount due and the time required.[7]

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he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

[7] Article 3 reads as follows: "Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date

1. Under these paragraphs, only adjustments *"resulting from"* a change in specifications are allowable. It is quite clear from this language that only the contractor whose specifications are changed is entitled to an adjustment. The reference to "the contractor" in the singular also demonstrates that the clause is concerned with the person who is a party to the contract and with his specifications, not with those of others.[8]

This interpretation of Article 4 is supported by its background. Although an owner is not ordinarily liable to a contractor for additional expense caused by unanticipated difficulties or delay, it is now settled that one who submits specifications to a contractor and requests the

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the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

[8] An evident reason for making an adjustment for differences in time resulting from a change in specifications is the penalty imposed by the contracts upon contractors who do not complete the work in the time specified. The adjustment contemplated would presumably be the saving of any penalties which would accrue because of the delay in completing the contract. The respondent in this case obviously could suffer no liquidated damages because of delayed completion of the general construction work, since his time would automatically be extended to the adjusted completion date under the general construction contract. Furthermore, such a provision for an adjustment of time enables the Government to fix a modified date for completion of the contract, from which date liquidated damages could be computed.

contractor to bid on that basis impliedly warrants the accuracy of the specifications. *United States* v. *Spearin*, 248 U. S. 132. The contractor accordingly is allowed the usual remedies for breach of contract or warranty, namely, the right to stop work in the event of a substantial breach (*United States* v. *Atlantic Dredging Co.*, 253 U. S. 1), and the right to recover damages for any losses suffered. *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Smith*, 256 U. S. 11.

The standard form government contract, in Articles 3 and 4, allows the recovery of damages by way of equitable adjustment, rather than for breach of warranty. These articles, however, deprive the contractor of his right to cease work if the original plans cannot be followed, and leave only the right to secure an adjustment of the price. In particular, Article 4 was plainly intended to prevent abandonment of the work in the event of discovery of unforeseen subsurface conditions. There is nothing in the article to suggest an intention to enlarge the class of persons to whom the Government would have been accountable in its absence.

The basis for the implication of a warranty, in the absence of an express provision of the contract, is that the party furnishing the specifications has invited the contractor to estimate his costs and make his bid on the basis of a specifically

defined project; "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *United States* v. *Spearin, supra; Hollerbach* v. *United States, supra;* cf. *Simpson* v. *United States,* 172 U. S. 372; *Lentilhon* v. *City of New York,* 102 App. Div. 548, 92 N. Y. Supp. 897.

In this case the general construction contractor could rightfully rely on the specifications as to subsurface conditions as a basis for its bid for the construction of the foundation, since the nature of the soil would determine the amount of work involved in excavating and also the nature of the foundations to be constructed. This cannot be said for respondent. Certainly the plumbing, heating, and electrical contractor would not base his bid upon the specifications for the subsurface conditions which ordinarily would not, and in this case did not, affect the nature or amount of his work. Since he was not bound to follow the Government's subsurface specifications, and since such specifications had no bearing upon the work which he undertook to perform, there was no reason why the Government should have been regarded as warranting their adequacy as to him.[2]

[2] The respondent's sole interest in the work of the general contractor was as to when the construction of the foundation would be sufficiently advanced to permit commencement of respondent's own work. But it seems unreasonable to be-

Cf. *MacArthur Bros.* v. *United States*, 258 U. S. 6.

In the absence of Article 4, the Government's warranty as to subsurface specifications would have extended only to the contractor whose work was directly defined and controlled by the particular specifications involved. Inasmuch as Article 4 was not intended to enlarge the Government's liability, the scope of persons entitled to an equitable adjustment is similarly limited.[10]

2. Article 4 was included in the standard form contract adopted in 1926. It states that adjust-

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lieve that the plumbing, heating and electrical contractor would be sufficiently familiar with the work involved in excavating and laying foundations to enable him to estimate the time of performance on the basis of the physical specifications with respect to the subsurface conditions. In fact, in arriving at an estimate of the time when the progress of the general contractor's work would permit respondent to begin, respondent requested and was guided by the advice of the contracting officer. In brief, the respondent had no interest in the specifications for the foundation but only in the time of completion; and the Government could not reasonably anticipate that respondent would rely on the subsurface specifications in estimating the approximate date for the commencement of its own work.

[10] The opinion of the court below cites no decision based upon a comparable factual situation. In *Cauldwell-Wingate Co.* v. *New York*, 276 N. Y. 365, 12 N. E. (2d) 443, a 4–3 decision of the New York Court of Appeals, the contractor for the superstructure was allowed to recover damages due to the delay of the excavation and foundation contractor resulting from the inaccurate description of subsurface conditions. However, the contract specified the date when the foundations would be completed to permit the claimant to proceed and differed in other significant respects from that involved here.

ments shall be made as provided in Article 3, and Article 3 contains language very much the same as that found in Article 4. Both articles are concerned with adjustments for changes in specifications required by the Government during the progress of the work, Article 3 being general and Article 4 relating to changes resulting from the discovery of unexpected subsurface conditions. In view of the specific incorporation by reference of Article 3 in Article 4, and the similarity of language, it seems clear that the two articles should be given the same interpretation.

Numerous decisions have held that under Article 3 and predecessor clauses, where the Government reserves the right to make changes in the drawings and specifications, it is not liable for damages from delay resulting from those changes. *McCord* v. *United States*, 9 C. Cls. 155, affirmed *sub nom. Chouteau* v. *United States*, 95 U. S. 61; *Swift* v. *United States*, 14 C. Cls. 208, 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Griffiths* v. *United States*, 74 C. Cls. 245; *Fore River Shipbuilding Co.* v. *United States*, 62 C. Cls. 307, 317; *Carroll* v. *United States*, 67 C. Cls. 513.

In *Chouteau* v. *United States, supra*, this Court held that where the delay was caused by Government change orders which were contemplated by the contract, no recovery in the nature of damages for delay might be had, saying (p. 68):

> It is very clear that both parties contemplated the probability that the work would

> not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. * * *

The Court of Claims has held that the privilege of making changes, with its implication of delay, was bought and paid for in the contract price. In *Griffiths* v. *United States, supra,* the court said (p. 255):

> The provisions of a contract authorizing changes * * * carries with it the reasonable implication that if such changes are made a delay in the prosecution of the work may result. * * * The Government can not be subjected to damages for exercising a privilege bought and paid for by it, in the absence of a showing it has abused such privilege. * * *

In *Carroll* v. *United States,* 76 C. Cls. 103, the Court of Claims said (p. 121):

> A careful consideration of the record undoubtedly establishes that the performance of changes delayed performance of the original contract work. Of course the plaintiffs may not recover for this delay.

> The contract provisions contemplated this event, and the pay provisions compensated the plaintiffs accordingly. * * *

It is our view that the reasoning and conclusions set forth above have equal application to the scope of recovery under Article 4. The language of the two articles is substantially the same and such differences as do exist import no change in meaning. Nevertheless, the Court of Claims in recent cases has held that its reasoning with respect to Article 3 is not applicable to recovery for delay under Article 4. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Sobel* v. *United States*, 88 C. Cls. 149; *Stapleton Construction Co.* v. *United States*, 92 C. Cls. 551; *Hirsch* v. *United States*, 94 C. Cls. 602; *Herbert M. Baruch Corp., Inc., Ltd.* v. *United States*, 92 C. Cls. 571; *Herbert M. Baruch Corp., Ltd.* v. *United States*, 93 C. Cls. 107.

The theory of these cases is expressed in the *Rust Engineering Co.* case, *supra*, where the court said (p. 475):

> The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such

> changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. * * *

It is submitted that these decisions are inconsistent with the decision of this court in *Chouteau* v. *United States, supra,* as well as with numerous rulings of the Court of Claims under Article 3 and similar clauses, and are incorrect. Article 4 makes it clear that changes may be made for subsurface or latent conditions differing materially from those thought to exist, and provides that the adjustment procedure established in Article 3 shall be followed. Every reason supporting the established rule in cases of changes under Article 3 exists also in the case of changes under Article 4. The only reason advanced for making a distinction is that changes under Article 3 are contemplated by the contract while changes due to subsurface or latent conditions are not so contemplated. As we have stated above, the terms of Article 4 negative that contention; it is as clearly envisaged that subsurface conditions not believed to exist may be discovered during the course of the work and necessitate changes in design and plans as it is that the Government may decide to alter the specifications of the contract under Article 3. In both cases, it is not known at the time of execution of the contract that there *will* be changes under Article 3 or 4; in both cases, it is realized and stipulated that there *may* be such changes, and suitable provision therefor is made.

Changes under Article 4 are thus within the contemplation of the parties, in exactly the same sense that changes under Article 3 are within their contemplation.

Any basis for a distinction between the scope of recovery under the two provisions is negatived by the terms of the contract. The provision in Article 4 for adjustment in case of increase of cost or time required for performance differs in no material respect from that of Article 3, and the former declares that the contract price "shall be adjusted as provided in Article 3." Thus, under the express terms of the contract, the remedy provided in the event of change orders under the two articles was intended to be precisely the same.

There is no occasion now to consider whether, as an original question, compensation for delay should be allowed. Article 4 should be construed in the light of the rule established when it was adopted. At that time, the reservation in Article 3 of the right to make changes had been held to negative any right to damages for delay caused by such changes and it seems reasonable to conclude, therefore, that Article 4 was intended to be given the same effect. The respondent may reasonably be assumed to have made its bid on this basis.

3 Regardless of plaintiff's claim to additional compensation under Article 4, he is entitled to no

recovery here because there is no showing that an appeal from the contracting officer's rejection of the claim under Article 4 was made to the head of the department, as provided in Articles 4, 3, and 15. Article 4 provides that in the event of changes thereunder the contract price "shall be adjusted as provided in Article 3 of this contract." Article 3 provides that if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15. Article 15 provides that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer, subject to appeal to the head of the department concerned, whose decision shall be final.

The record establishes that the plaintiff insisted that an equitable adjustment be made by the contracting officer under Articles 4 and 3 of its contract, increasing its contract price to meet the increased cost due to delay and the new conditions under which the work would have to be performed (R. 24). The contracting officer held that the contractor was entitled to no adjustment under Articles 4 and 3 (R. 24). The plaintiff did not allege, however, and the record does not show that an appeal from the contracting officer's rejection of the plaintiff's claim was made to the head of the department as required by the con-

tract. The respondent's claim should be rejected on this ground alone. It is well settled that failure to comply with the procedure provided by contract for the settlement of claims precludes a recovery by suit in the Court of Claims. *Plumley* v. *United States*, 226 U. S. 545; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *John McShain, Inc.* v. *United States*, 88 C. Cls. 284, 297–299;[11] *Alliance Construction Co., Inc.* v. *United States*, 79 C. Cls. 730; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Bray* v. *United States*, 46 C. Cls. 132; see *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 113.

Respondent has suggested (Brief in Opposition, pp. 4–5) that the contracting officer's refusal to make an equitable adjustment under Articles 3 and 4 was a conclusion of law and that Article 15 applies only to determinations of fact. It is clear that the parties could validly agree to leave questions of the interpretation of the contract to the contracting officer, subject to appeal to the head of the department. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547. It is our view that the parties have done so here with respect to disputes under Articles 3 and 4. The provisions of Article 3 for

[11] This case involved several claims. The decision of the Court of Claims with respect to a claim which did not present a question relevant here was reversed by this court. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520.

adjustment of disputes, which are made applicable to Article 4, relate to "any claim for adjustment" (R. 8), which would seem to cover all issues and not merely issues of fact. The reference to Article 15, we believe, was intended to incorporate the appeal procedure of the latter article and not to narrow the scope of the subject matter of the appeal merely to questions of fact. Indeed, had the provision for adjustment of disputes in Articles 3 and 4 been intended to apply solely to "disputes concerning questions of fact", little purpose would be served by the adjustment provisions in Articles 3 and 4, since Article 15 would automatically have covered all disputes of fact arising under Articles 3 or 4 as well as under other provisions of the contract. Articles 3 and 4 were intended to make specific provision for modifications in the terms of the contract resulting from the discovery of subsurface or latent conditions at the site materially different from those shown in the drawings or specifications (Article 4), or changes in the specifications or drawings required for other reasons (Article 3). The provisions for adjustment contained in those Articles, in order fully to effectuate their obvious purposes of preventing stoppage of work by relegating disputes to administrative determination, must be construed as co-extensive with the scope of the Articles themselves.[12]

[12] See Government's brief in *United States* v. *Callahan Walker Construction Company*, No. 65, this Term, pp. 31–34.

III

THE ISSUANCE OF THE STOP ORDER DID NOT OF ITSELF CONSTITUTE AN ACTIONABLE BREACH OF CONTRACT

The opinion of Judge Green (R. 32), and particularly the brief concurring statement of Chief Justice Whaley and Judge Jones (R. 34), may possibly be construed to rest on the theory that the Government is liable because its contracting officer interrupted the work by issuing a stop order. A sufficient answer is that the immediate cause of the stoppage was the existence of unforeseen subsurface conditions and that the stop order merely recognized but did not cause the necessity of an interruption. And we have shown above that the Government is not liable to the respondent for delays caused by the inaccuracy of the subsurface specifications.

Moreover, Article 8 (g) of the Standard Specifications for General Conditions expressly reserves to the Government the right "to suspend any portion of the contract work wherever the Administrator [of Veterans' Affairs] deems it necessary for the purpose or advantage of the work."[11] And the contracting officer was im-

[11] The specifications, which were incorporated by reference in and made a part of the contract (R. 7), were for some reason not set forth with the contract in the printing of the record. Article 8 (g) thereof, however, was relied upon by the Government in its petition (p. 9) and its terms are not controverted.

pliedly authorized to stop the general contractor's work as an incident to the issuance of a change order under Article 4. This authority necessarily included the power to stop the respondent's work, since the latter was by the contract plainly made dependent on that of the general contractor. The exercise of an authority conferred by the contract cannot constitute an actionable breach of contract. Respondent, therefore, cannot claim compensation for damages caused by the issuance of a stop order under Articles 8 (g) or 4 in the absence of some contractual undertaking by the Government to give compensation. We have shown above, however, that Article 4, the only provision which could possibly be deemed to embody such an undertaking, provides no basis for recovery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE 1942